International Seabed Authority

ISBA/22/LTC/6

# Legal and Technical Commission

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## Procedures for the handling of confidential data and information pursuant to rule 12 of the rules of procedure of the Legal and Technical Commission

**Note by the secretariat**

## I. Introduction

1. By paragraph 8 of its decision ISBA/20/C/31, the Council of the International Seabed Authority requested the Legal and Technical Commission to prepare draft procedures on the handling of confidential data and information, as provided for in rule 12 of the rules of procedure of the Commission (ISBA/6/C/9), to be submitted to the Council for consideration and approval not later than at its 2016 session. Under rule 12 (2), the Commission is to recommend to the Council, for approval, procedures on the handling of confidential data and information coming to the knowledge of members of the Commission by reason of their duties for the Commission. Such procedures are to be based upon the relevant provisions of the United Nations Convention on the Law of the Sea, the rules, regulations and procedures of the Authority and the procedures established by the Secretary-General pursuant thereto in order to carry out his responsibility to maintain the confidentiality of such data and information. The present note has been prepared in response to that request.

## II. Background

2. In 2013, at the nineteenth session of the Commission, members drew attention to the provisions of article 163 (8) of the Convention and rule 11 of the rules of procedure pertaining to financial interests in activities relating to exploration and exploitation in the Area. The Commission requested the secretariat to provide it with clarification and guidance as to the scope and interpretation of those provisions (see ISBA/19/C/14, para. 24). Pursuant to that request, the secretariat, with the assistance of a consultant, prepared a report on considerations relating to the interpretation and application of article 163 (8) of the Convention and of rule 11 of



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the rules of procedure (ISBA/20/LTC/CRP.2), which contained recommendations for consideration by the Commission.

3. The Commission considered the report and guidance prepared by the secretariat at its twentieth session, in 2014. It emphasized that it was primarily incumbent on each member of the Commission to ensure that he or she complied with the obligations set out in the Convention in the interest of transparency and accountability and the evolving workload of the Commission. The Commission also considered that the provisions of rule 11 of its rules of procedure, together with the written undertaking signed by each member upon joining, were sufficient and satisfactory to guarantee transparency and secure such accountability from members (see ISBA/20/C/20, para. 36). Notwithstanding the conclusions reached by the Commission, as indicated above, the Council, by paragraph 8 of its decision ISBA/20/C/31, requested the Commission to prepare draft procedures on the handling of confidential data and information.

## III. Relevant provisions of the Convention and the Regulations

4. Article 163 (8) of the Convention stipulates the following:

> Members of Commissions shall have no financial interest in any activity relating to exploration and exploitation in the Area. Subject to their responsibilities to the Commissions upon which they serve, they shall not disclose, even after the termination of their functions, any industrial secret, proprietary data which are transferred to the Authority in accordance with Annex III, article 14, or any other confidential information coming to their knowledge by reason of their duties for the Authority.

5. An equivalent provision in relation to non-disclosure by the Secretary-General and staff of the secretariat appears in article 168 (2). Accordingly, while articles 163 and 168 establish obligations of non-disclosure, those obligations are expressly qualified as "subject to their responsibilities" to the Commission and the Authority, respectively. It can be inferred that the qualification is in each case intended to ensure that confidential information is available for use by the Commission and by the Secretary-General and his or her staff in the proper performance of their duties.

6. While the Convention thus establishes an obligation not to disclose confidential information, and to some extent defines what data and information are to be considered confidential, it does not deal with the procedures by which confidential information is to be handled. Instead, the procedures are outlined in the various sets of regulations on prospecting and exploration. Thus, regulation 37 of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (ISBA/19/C/17, annex) deals with procedures to ensure confidentiality.[1] Regulation 37 (3) provides that the Commission is to protect the confidentiality of confidential data and information submitted to it pursuant to the Regulations or a contract issued thereunder. Thereafter, the obligations of non-disclosure under article 163 (8) of the Convention are repeated.

[1] The same provision is found in regulation 39 of the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (ISBA/16/A/12/Rev.1, annex) and regulation 39 of the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area (ISBA/18/A/11, annex).

7. In addition, members of the Commission are also bound individually by regulation 37 (2), which provides that a person who is authorized to have access to confidential data and information is to make a written declaration witnessed by the Secretary-General to the effect that the person acknowledges his or her obligation and agrees to comply with the applicable regulations and procedures established to ensure the confidentiality of such data and information. In accordance with that provision, such a declaration is routinely made by each member of the Commission immediately following his or her election.

8. Pursuant to regulation 37 (1) of the Nodules Regulations,[2] the Secretary-General is responsible for maintaining the confidentiality of all confidential data and information. To achieve that objective, the Secretary-General is to establish procedures, consistent with the provisions of the Convention, governing the handling of confidential information by members of the secretariat, members of the Commission and any other person participating in any activity or programme of the Authority.

9. Pursuant to that obligation, the Secretary-General, in 2011, issued procedures for information sensitivity, classification and handling in the form of a Secretary-General's bulletin (ISBA/ST/SGB/2011/03). Such bulletins are official documents of the Authority, issued to promulgate policy on questions that engage the responsibility of or involve formal acts carried out by the Secretary-General under the Staff Regulations and Rules, operational rules of the organs of the Authority or any other relevant regulations, agreement or protocol.

10. In the bulletin, the Secretary-General established procedures to ensure the appropriate classification and secure handling by the secretariat of confidential data and information entrusted to or originating from the Authority, with a view to implementing article 168 of the Convention and the Regulations. The Secretary-General defined therein the scope of applicability and the responsibilities and basic obligations of staff, in addition to elaborating on the classification principles, classification levels and procedures for identification and marking of documents, including those to be provided to members of the Commission in the course of their work. He also set out the disciplinary process in the case of alleged violations by staff of the secretariat. The bulletin entered into force on 1 February 2011.

11. Annex II to the bulletin contains additional procedures for the handling of confidential data and information transferred to the Authority or to any other person (including members of the Commission) participating in any activity or programme of the Authority pursuant to the Regulations or a contract issued thereunder. It contains procedures on general security, system access control, authenticity and data access security. It also contains procedures for communication security, data security and the handling and processing of data and information, together with a declaration of confidentiality to be signed by persons authorized to have access to such confidential data and information.

[2] See also regulation 39 (1) of the Sulphides Regulations and regulation 39 (1) of the Crusts Regulations.

## IV. Discussion and recommendation

12. The procedures contained in annex II to the Secretary-General's bulletin on the handling of confidential data and information would appear to be sufficient and appropriate to safeguard the confidentiality of confidential data and information used by members of the Commission in the course of their duties. It is to be noted, however, that not all the provisions are binding upon members. Some elements, such as the basic obligations and disciplinary measures in the event of violations contained in section 4 of the bulletin, are clearly not applicable because members of the Commission are not staff members of the secretariat. In any case, it may be also noted that, should it be alleged that a member of the Commission has breached the obligation of non-disclosure, the Council has the power under rule 13 of the rules of procedure to institute appropriate proceedings (the precise nature of which is not specified).

13. Other provisions of the bulletin, however, in particular the entirety of its annex II, could be applied to members of the Commission and would appear to provide a satisfactory response to the requirement under rule 12 of the rules of procedure to establish procedures on the handling of confidential data and information. The approach would also be consistent with the Regulations, which empower and require the Secretary-General to establish procedures to govern the handling of confidential data and information by members of the secretariat, members of the Commission and others. In that regard, it may be considered undesirable to establish separate, and potentially inconsistent, procedures for that purpose applicable only to members of the Commission.

14. Taking into account the foregoing, in particular the need to ensure the consistent application of the existing procedures formulated by the Secretary-General, the Commission may wish to recommend to the Council that it take a formal decision to apply the additional procedures for the handling of confidential data and information contained in annex II to the Secretary-General's bulletin to the members of the Commission, mutatis mutandis.

15. The Commission is invited to take note of the present note and make an appropriate recommendation to the Council.